

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHRISTOPHER HART, et al.,

Plaintiffs,

-vs-

13-CV-6458

CRAB ADDISON, INC., et al.,

Defendants.

Proceedings held before the
Honorable Marian W. Payson, Kenneth B.
Keating Courthouse, 100 State Street,
Rochester, New York, on June 6, 2018.

APPEARANCES:

JESSICA L. LUKASIEWICZ, ESQ.,
Appearing for Plaintiffs.

CHRISTOPHER M. FARELLA, ESQ.,
MELISSA J. OSIPOFF, ESQ., and
BRIAN J. GERSHENGORN, ESQ.
Appearing for Defendants.

WILLIAM G. BAUER, ESQ.
Appearing for Fisher & Phillips, LLC.

AUDIO RECORDER: Catherine A. Marr

TRANSCRIBER: Michelle L. McLaughlin, RPR,
Court Reporter,
716/332-3560

(Proceedings recorded by electronic sound
recording, transcript produced by computer.)

1 THE COURT: . . . like to note their
2 appearances for the record.

3 MS. LUKASIEWICZ: Good afternoon, your
4 Honor. Jessica Lukasiewicz from Thomas and Solomon
5 on behalf of the plaintiffs.

6 THE COURT: Okay. Miss Lukasiewicz.

7 MR. BAUER: Your Honor, William Bauer,
8 Woods Oviatt Gilman, appearing on behalf of the
9 Fisher Interested Parties.

10 THE COURT: Okay.

11 MR. FARELLA: And, your Honor, Christopher
12 Farella on behalf of the Epstein Becker and Green
13 for the Epstein Becker and Green firm and any of
14 the attorneys that represented Ignite. Thank you.

15 THE COURT: Mr. Farella, how are you?

16 MR. FARELLA: I'm well, thank you, your
17 Honor.

18 THE COURT: Good. Okay. So pending
19 before the Court for oral argument this afternoon
20 is plaintiffs' renewed motion for sanctions. I am
21 certainly quite familiar with the record that gives
22 rise to the motions before the Court, and I have
23 carefully reviewed the motion papers and reviewed
24 various cases which relate to issues that had been
25 raised in the motion papers.

1 What I'd like to do is invite oral argument
2 from three counsel who are present, and I have
3 quite a number of questions that I have for each of
4 you. I want to make sure that when we're done
5 today that nobody feels as if they have been
6 curtailed in arguing or presenting any facts to me,
7 so I will try to make sure that I give you enough
8 time to tell me what it is that you want to
9 emphasize. But I will ask you a lot of questions,
10 and at the end, if there's anything you want to
11 say, please be sure and let me know that, okay?

12 Miss Lukasiewicz.

13 MS. LUKASIEWICZ: Your Honor, we
14 appreciate that you're very familiar with the facts
15 in this case, and as set forth in our reply papers,
16 we believe that while we would be successful and we
17 should be successful in our current submissions, we
18 understand there's that strong desire by the
19 Second Circuit to have a full record with an
20 evidentiary hearing, and so we would respectfully
21 submit at this time that an evidentiary hearing is
22 scheduled and we move forward on that.

23 THE COURT: What do I need to have a
24 hearing on?

25 MS. LUKASIEWICZ: I think some of the

1 points that counsel has raised in their response
2 papers certainly -- and I think everything in the
3 sanctions motion but, you know, for example, they
4 have the Metzger affirmation, which is the first
5 time that that has been raised in response to the
6 sanctions motion, and I think certainly issues like
7 that would need to be raised and addressed and can
8 be addressed at a sanctions -- at an evidentiary
9 hearing.

10 THE COURT: Okay. So tell me what you
11 would envision would happen at a hearing.

12 MS. LUKASIEWICZ: I think what we would
13 envision is that, you know, a -- you know, a status
14 conference would be scheduled in advance to see if
15 there's any discovery that would need to be done in
16 advance to limit anything that needs to be
17 addressed at the evidentiary hearing. But it could
18 be anything from any of the issues addressed by a
19 defense counsel, again, any affidavits that they're
20 now putting in support of their motion or in their
21 opposition papers. For example, I think, you know,
22 indicates that counsel is not responsible now for
23 any of the allegations in the sanctions motion. So
24 I think that would need to be addressed through the
25 sanctions hearing. And I think just for the

1 benefit of having a full record, since the Second
2 Circuit has had that propensity that a full record
3 needs to be satisfied before kind of deciding a
4 sanctions motion.

5 Again, we think we've set forth the basis, but
6 we do think that it would allow a full record to be
7 developed. Anything additional that --

8 THE COURT: Do you think the decision
9 about whether to have a hearing is a decision
10 that -- do you think I am required to have a
11 hearing, or do you think in an exercise of either
12 prudence or discretion I should have a hearing?

13 MS. LUKASIEWICZ: I think that it's
14 probably somewhere in between those two answers. I
15 guess I think that based on the Second Circuit's
16 decisions that it is the best idea and the way that
17 it should go in order to ensure that we have the
18 full record, I'm not sure if it's -- there is a
19 requirement based on my readings of it. I just
20 think that that is something that would be
21 eventually, potentially that we would have to deal
22 with. And I think, based on what counsel has
23 represented in the past, that they would certainly
24 likely appeal any decision. So I think we are
25 addressing that before getting up to any appeal and

1 then coming back down and dealing with it two years
2 later.

3 THE COURT: Okay. You mentioned in your
4 answer something about discovery. Am I correct
5 that there's -- no where in your papers do you make
6 an application for discovery.

7 MS. LUKASIEWICZ: And I'm not sure that
8 there would be any necessary. I'm just saying
9 there would be a status conference. We can discuss
10 whether there would need to be any at that time,
11 and then quickly move forward with an evidentiary
12 hearing at that time.

13 THE COURT: I'm not sure I would see the
14 need for a status conference. It seems to me that
15 we have motions, motions are fully briefed, and
16 either I have a hearing or I don't have a hearing.
17 What about if I were to make a determination that
18 there was not a -- a sufficient either showing or
19 allegation of bad faith to warrant an evidentiary
20 hearing on the question of bad faith, do you think
21 that there still should be a hearing on any other
22 issue?

23 MS. LUKASIEWICZ: Well, I'm not sure that
24 there's always a requirement of the bad faith. It
25 could be the -- and I think we put in our papers

1 that the negligence or -- I believe it's negligence
2 or willfulness, that could go towards it. There's
3 other factors that can be -- it's not just a
4 straight bad faith. So I think it would still make
5 sense to go ahead again to develop that record to
6 make sure. I think we -- based on defense
7 counsel's response, that makes the most sense,
8 since they've now raised points that can be parsed
9 out at the evidentiary hearing fully addressed at
10 that time.

11 THE COURT: Okay. Stick with me on the
12 issue of what I'm having a hearing on. Let's
13 say -- let's say bad faith is -- is not an issue
14 that I intend to have a hearing on, and I'm not
15 saying I've made that determination. But I think
16 typically in sanctions cases, it is -- excuse me,
17 in the context of an allegation of bad faith that
18 the Court says either a hearing is required in
19 order to make a determination or a hearing would be
20 helpful, prudent. So, your contention that even if
21 bad faith were not an aspect to this motion, that
22 there are issues that need to be addressed at a
23 hearing, and we can address that at a status
24 conference and so forth.

25 You know, I'd like to find out from you, if

1 you're in a position to tell me with as much
2 specificity as possible, what exactly those issues
3 are beyond whether counsel took action that you
4 believe warrants sanctions, and that those actions
5 were motivated by bad faith. So let's take the bad
6 faith off the table. What do I need to have a
7 hearing on or what should I have a hearing on?

8 MS. LUKASIEWICZ: I think our position is
9 is that we think we would submit submissions on
10 what we think is appropriate to do at the
11 evidentiary hearing, if that was something that the
12 Court was inclined to do other than, you know, what
13 I stated today, and we could brief any issues that
14 we think whether -- if the Court does not agree
15 about bad faith being a factor, if we need to, or
16 something that needs to be addressed at an
17 evidentiary hearing, we can certainly brief that in
18 advance of that evidentiary hearing so it's clear
19 and concise about what would be addressed at that
20 time.

21 THE COURT: Well, I guess I'm trying to --
22 you put in a one-page reply that says we need to
23 have a hearing. So it seems to me it's reasonable
24 to expect that you'd come to argument today telling
25 me what we need to have a hearing on, not I'm going

1 to get further submissions on that question. And
2 I'm trying to find out whether your argument is
3 because you have alleged bad faith you're entitled
4 to have a hearing on that question, or whether you
5 are arguing, you know, as I said, even in the
6 absence of that, you're entitled to have a hearing.
7 And maybe, you know, the candid answer is I don't
8 really know as to whether we would have to have a
9 hearing if there weren't -- if there were not an
10 allegation of bad faith.

11 MS. LUKASIEWICZ: I guess I would say that
12 I would probably want to further consider that if
13 there was not the bad faith thing on the table --
14 element on the table, and certainly we could submit
15 anything on that and follow up with you immediately
16 as to our position on that. But I guess that would
17 be my position right now.

18 THE COURT: Okay. So if I were to ask you
19 right now, if I said, okay, in your reply you asked
20 for a hearing, we're going to have a hearing, you
21 know, two weeks from today, what witnesses do you
22 anticipate calling at the hearing? You're not
23 today in a position to answer that question?

24 MS. LUKASIEWICZ: I'm not in a position
25 today to outline what would be specifically

1 addressed, other than what we believe that we've
2 raised and defense counsel has raised in opposition
3 to the sanctions motion. But I don't have point
4 items in order to address that.

5 THE COURT: Okay. As far as what is in
6 the record on the motion papers, what allegations
7 or what disputed facts are there that you think
8 give rise to the need for a hearing?

9 MS. LUKASIEWICZ: I mean, I think
10 certainly, you know, defense counsel, as we saw in
11 the papers, certainly did not admit that they're at
12 fault for any of the actions or that there was
13 really misrepresentations made at any state. So,
14 whether it relates to the class list or the
15 subsequent claims that we made, which is in towards
16 candor to the Court as well as plaintiff's counsel,
17 violating court orders, I think that's where there
18 is dispute, I believe into -- that at least defense
19 counsel raises and thinks that they're raising into
20 dispute on all of those claims.

21 THE COURT: Okay. Well, let's say --
22 let's talk about misrepresentations. In a number
23 of cases you point to specific statements made by
24 defense counsel which you contend are sanctionable
25 because they really amount to misrepresentations.

1 MS. LUKASIEWICZ: Correct.

2 THE COURT: Correct? So, we know what the
3 record is as to those statements, and either I have
4 copies of letters or we have transcripts. So I
5 don't disagree with you that we have the plain
6 language, and I don't have in -- certainly in all
7 instances and maybe even in most instances, any
8 indication from counsel as to what was in their
9 mind when they -- when they made that statement or
10 not. But what would you offer at a hearing on --
11 on that question?

12 MS. LUKASIEWICZ: And it's difficult,
13 because I feel like it puts me in a tough position
14 to not make their argument. Again, we think that
15 we could win on the sanctions motion on our
16 submissions, but, you know, I believe defense
17 counsel in one of their arguments about whether
18 they knew the exact number of errors at various
19 points and whether they could appear for the
20 June 6th hearing, there's some back facts that I
21 think have been brought up and whether or not they
22 were aware that they could not have somebody appear
23 at the June 6th hearing. So I think facts like
24 that would be the types of examples. But again, I
25 understand the Court is not interested in that at

1 this time. But we would certainly think that we
2 could outline or brief those specific issues in
3 advance of any evidentiary hearing. But those are
4 things off my head that I would think of.

5 THE COURT: Okay. I'm not sure I have a
6 really good grasp of what your argument about what
7 you think we need to have a hearing on and how
8 you -- how you would see that hearing going
9 forward, and particularly since you're the
10 plaintiff, you have the burden of proof. We had a
11 discussion -- somewhere in my notes I've got the
12 date, but I think it was the end of the summer
13 of 2016 with respect to this motion, and I had
14 discussed with plaintiff's counsel whether you
15 wanted to put witnesses on at that time or simply
16 offer your -- argue on the papers, and you elected
17 to argue on the papers. And I understand that was
18 before you saw the defendants' response. And
19 I'm -- and the one thing that you've specifically
20 identified for me, at least that I'm clear on
21 today, is the submission of the affidavit from
22 general counsel of Ignite, that you think raises
23 some factual issues that warrant a hearing.

24 MS. LUKASIEWICZ: Correct. And as we said
25 in our reply, we think it was based on hearsay and

1 not admissible anyway, but we do think --

2 THE COURT: And your argument is that
3 there's a basis for the Court to simply to decline
4 to --

5 MS. LUKASIEWICZ: To make a determination.

6 THE COURT: -- to rely on it and say it's
7 not admissible.

8 MS. LUKASIEWICZ: Correct. We do. But we
9 just think because of the Second Circuit's
10 propensity, it makes sense to develop the full
11 record at this time, even though we don't
12 necessarily -- we think that, yes, a decision could
13 be made, but to avoid any appeal risks that may
14 move forward, we think it makes sense at this time.

15 I do think, and as the Court indicated, when we
16 were asked about it, that was prior to any
17 response. Obviously we didn't know what their
18 response could be. I mean, not that it was likely,
19 but they could have admitted to everything or, you
20 know, not oppose it in the way that they did. So I
21 think it was difficult for us to anticipate it at
22 that time and know for sure what -- what course
23 made sense from here.

24 THE COURT: I'm not -- I'm not quarreling
25 with you as to whether you have a legal right in

1 reply to say that we think a hearing should be
2 ordered. I'm just trying to probe as to if I were
3 to say yes, what am I getting myself in for? I
4 mean, I'm certainly -- the last thing I want is
5 anymore discovery in a case in which the defendant
6 is -- I mean, the merits of this case are over.
7 The defendant has filed for bankruptcy. I know
8 there's some individual defendants out there.
9 Seems to me the claims against the individual
10 defendants were not the heart of this -- this case,
11 and we could certainly be in proceedings relating
12 to sanctions attorneys against attorneys for far
13 longer than the case was being litigated, and
14 particularly if I -- if I were to agree to -- to
15 conduct discovery. And I'm not interested in that.
16 I'm interested in resolving this in a fair way so
17 that all sides are fairly heard in an efficient
18 manner and ultimately as quickly as possible. I've
19 got -- you know, we all have other things I think
20 that we would rather be doing than this particular
21 sanctions motion.

22 MS. LUKASIEWICZ: And -- I'm sorry.

23 THE COURT: Go ahead.

24 MS. LUKASIEWICZ: And we agree. And
25 that's why we think it makes sense to go forward

1 with the evidentiary hearing so that we're not
2 coming back on this issue potentially in a year or
3 two when it has been up for appeal, so I would --

4 THE COURT: I know. But I'm entitled
5 to --

6 MS. LUKASIEWICZ: I would request that we
7 could do a submission.

8 THE COURT: But I'm entitled -- I'm
9 entitled to --

10 MS. LUKASIEWICZ: Correct.

11 THE COURT: -- to know from you, when you
12 come in and say I want a hearing, what do you mean,
13 a hearing on what issues? Who are going to be the
14 witnesses? How is it going to proceed? Not,
15 Judge, I think it's just better to have a hearing,
16 and we're, you know -- it's going to be less risky
17 for us that it ultimately comes back.

18 MS. LUKASIEWICZ: We would ask to submit
19 submissions specifically on an evidentiary hearing
20 and what would be addressed and have obviously
21 defense counsel the opportunity to respond. We
22 would think that would specifically address --

23 THE COURT: Okay. I'll reserve on that
24 request. I'm not granting --

25 MS. LUKASIEWICZ: Yes, your Honor.

1 THE COURT: -- the right for any further
2 submissions at this time. But I will reserve on
3 that application. Let me ask you some other
4 questions other than hearing related questions.

5 Are you seeking sanctions against the firm
6 Ogletree Deakins?

7 MS. LUKASIEWICZ: We are -- we're seeking
8 from either Ogletree Deakins, Fisher Phillips
9 wherever they have or are now, yes.

10 THE COURT: Has Ogletree Deakins ever been
11 served with this motion? I haven't heard from the
12 firm. And Miss Osipoff and Mr. Gershengorn, as far
13 as I know, are still not -- no longer affiliated
14 with Ogletree Deakins.

15 MS. LUKASIEWICZ: I just want to look at
16 my papers for one second, if I can.

17 I guess my answer would be that it would be
18 against Mr. Gershengorn and Miss Osipoff in their
19 capacity, so they have been notified about it, but
20 not against the firm individually.

21 THE COURT: Okay. So not against the firm
22 but against Miss Osipoff --

23 MS. LUKASIEWICZ: Except to the --
24 correct.

25 THE COURT: -- and Mr. Gershengorn.

1 MS. LUKASIEWICZ: Having been working on.

2 THE COURT: With respect to the Epstein
3 firm, does your motion seek sanctions against
4 individual attorneys at Epstein or the firm or
5 both?

6 MS. LUKASIEWICZ: I believe it's only
7 against the firm. I don't think we've identified
8 any specific attorneys.

9 THE COURT: Okay. All right. With
10 respect to the various sanctions that you -- that
11 you seek, the original sanctions motion was filed
12 before the bankruptcy. It was then renewed
13 pursuant to a court stipulated order. I want to
14 just confirm --

15 MS. LUKASIEWICZ: Sure.

16 THE COURT: -- that my understanding is
17 consonant with your understanding that you are not
18 seeking any more -- any merits-based sanctions,
19 because the case as far as the company, it is over,
20 and you've withdrawn your motion for sanctions
21 against the individual defendants.

22 MS. LUKASIEWICZ: So what we are seeking
23 is that if this had not happened and a significant
24 delay that was caused by the sanctions issues, the
25 sanctionable conduct, that it could have settled or

1 some other procedural posture could have happened
2 during that time. So, yes, we think that those
3 allegations continue to exist, and there could have
4 been a different recovery for those individuals.

5 THE COURT: No, no, no. But merits-based
6 meaning that the answer is stricken, that judgment
7 is awarded in favor of the plaintiffs, all of those
8 types of sanctions are off the table because
9 there's no procedural vehicle in which they -- they
10 don't make sense anymore, right?

11 MS. LUKASIEWICZ: Right. Yes, I
12 understand that there's no --

13 THE COURT: So as far as I can tell from
14 the papers, the sanctions that you are currently
15 seeking are -- and I'm taking this from your
16 papers -- written or verbal reprimands of counsel.

17 MS. LUKASIEWICZ: Correct, your Honor.

18 THE COURT: Reimbursement of costs and
19 fees.

20 MS. LUKASIEWICZ: Correct, your Honor.

21 THE COURT: Monetary sanctions against
22 counsel.

23 MS. LUKASIEWICZ: Correct, your Honor.

24 THE COURT: A requirement that future
25 courts be notified of attorney misconduct.

1 MS. LUKASIEWICZ: Correct, your Honor.

2 THE COURT: And referral of alleged
3 misconduct to disciplinary authorities, that is,
4 referral of the two identified lawyers.

5 MS. LUKASIEWICZ: Yes, your Honor. And I
6 did want to also identify -- it's on page 16 of our
7 brief -- but about Macaroni Grill employees, that
8 one would also be removed because that case has had
9 bankruptcy as well.

10 THE COURT: Okay. But I've identified
11 five different types of sanctions. As far as I can
12 tell, those are the only potential sanctions that
13 are still at issue.

14 MS. LUKASIEWICZ: I just want to make sure
15 you did identify, obviously, attorneys' fees. I
16 know you said costs and expenses.

17 THE COURT: Attorneys' fees.

18 MS. LUKASIEWICZ: -- as resulting from
19 that conduct, okay.

20 THE COURT: I have a feeling they may be
21 the most important thing --

22 MS. LUKASIEWICZ: Right.

23 THE COURT: -- that you're seeking. No, I
24 had not overlooked that.

25 MS. LUKASIEWICZ: Right.

1 THE COURT: Okay. So we are in agreement
2 on that?

3 MS. LUKASIEWICZ: Yes, your Honor. From
4 those lists I'm not aware of anything else outside
5 of that that we're continuing to --

6 THE COURT: Okay. I'm going to consider
7 that you've had the full opportunity to tell me if
8 there were anything else and that your agreement
9 with me as to this five means those are the five
10 that you're seeking.

11 MS. LUKASIEWICZ: At this time, yes. I
12 don't see any others.

13 THE COURT: All right. Can you confirm
14 for me that with respect to the first list, that
15 is, the March 2015 class list, there is no factual
16 or legal basis to award sanctions against
17 Miss Osipoff, Mr. Gershengorn or the firms that
18 they were affiliated with.

19 MS. LUKASIEWICZ: So the only thing that I
20 would say in terms of that would be the failure to
21 correct it quicker, so that, for example, you know,
22 issuing -- I'm sorry, sending out that notice to
23 the hundred plus thousand people and then failing
24 to correct that resulted in a significant amount of
25 legal work.

1 THE COURT: I'm talking about in
2 March 2015 --

3 MS. LUKASIEWICZ: Correct.

4 THE WITNESS: -- the first list was turned
5 over.

6 MS. LUKASIEWICZ: Correct.

7 THE COURT: That list had inaccuracies on
8 it. But in terms of the preparation of that list
9 and the turning over of that list --

10 MS. LUKASIEWICZ: Correct.

11 THE COURT: -- in March, the preparation
12 of the first list that was inaccurate, you're not
13 seeking to impose sanctions against them for the
14 original preparation and turning over of that
15 inaccurate class list.

16 MS. LUKASIEWICZ: Correct. Only the
17 failure to correct it quicker.

18 THE COURT: Okay. All right. What is
19 the -- what is or are the legal bases on which you
20 seek sanctions against Epstein?

21 MS. LUKASIEWICZ: I know it was raised in
22 response to the motion that we somehow entered a
23 settlement that they would not be eligible to any
24 recovery through the Ignite action. I think that
25 was raised in response to one of the briefs. And

1 we don't think that is the case. There certainly
2 hasn't been any exception. That was counsel at the
3 time, the attorneys that were currently
4 representing Ignite that were excluded. It wasn't
5 any former people who were representing them,
6 and -- you know, in any time, so that was specific
7 for current counsel. So, we think certainly all
8 the bases that we set forth, whether it's Court's
9 inherent power, certainly we think that, you know,
10 FRCP 37(b), 16(f) and, you know, Section 1927, we
11 do think those are all appropriate. And certainly,
12 you know, for example, Section 1927, we think that
13 it caused significant multiplication of proceedings
14 even before new counsel came on. There was a lot
15 of letters and communications with the Court that
16 needed to be made that certainly would not have
17 been necessary and resulted in a significant amount
18 of motion practice, obviously, coming off that
19 first motion.

20 THE COURT: All right. Let's stick with
21 Epstein. Epstein was out of the case at the end of
22 March.

23 MS. LUKASIEWICZ: Correct. But their
24 conduct caused a significant amount of issues that
25 followed through, as we know, for 18 months or at

1 least -- and followed through for quite a while
2 since the last class list that we were provided
3 still said that there was, you know, 5,500 people
4 that in various ways were either included or still
5 should not have been included. And sending out
6 notice to a hundred plus thousand people --

7 THE COURT: So where do you draw the line
8 between when new counsel and their client bear full
9 responsibility for the failure to correct the
10 errors in the class list and the conduct going
11 forward? I mean, either procedurally or
12 chronologically. There must be some point in time
13 where you would say, okay, you know, we're not
14 seeking the whole Epstein responsible any longer
15 ten years down the road, because new counsel, you
16 know, didn't do what they were supposed to do for
17 ten years.

18 MS. LUKASIEWICZ: I mean, certainly I
19 think the easiest is when counsel first was -- this
20 new counsel, Ogletree Deakins was in communication
21 with us. I think that's one of the issues that
22 could potentially be addressed at the evidentiary
23 hearing.

24 THE COURT: Well, I mean, when was that?
25 I mean, that was --

1 MS. LUKASIEWICZ: I believe it was
2 approximately June 2016.

3 THE COURT: All right.

4 MS. LUKASIEWICZ: Or, I'm sorry, 2015 I
5 believe.

6 THE COURT: You would agree with me, would
7 you not, that under the statute 1927 and under the
8 Court's inherent power that those sanctions -- that
9 those sanctions do require a showing of bad faith?

10 MS. LUKASIEWICZ: I think there's
11 authority for certainly 19 -- Section 1927 that it
12 does not have to be the bad faith.

13 THE COURT: And that's the -- that's the
14 Seltzer case --

15 MS. LUKASIEWICZ: Correct.

16 THE COURT: -- the Second Circuit case.
17 That's a somewhat narrow holding, isn't it? That
18 would be you don't have to have bad faith if the
19 conduct -- challenged conduct was not undertaken
20 for the client's benefit. But if it is, the
21 conduct that's challenged was undertaken for a
22 client's benefit, I think that case stands for the
23 proposition that a showing of bad faith would be
24 required before sanctions are imposed under 1927.

25 MS. LUKASIEWICZ: I think we certainly

1 read it that, you know, a negligent or reckless
2 failure to perform their responsibilities would be
3 included. But I understand your position. But I
4 think we would think that their behavior does fall
5 upon this, that --

6 THE COURT: I think it's pretty -- I think
7 that was pretty black letter in Seltzer, wasn't it,
8 a requirement of bad faith under those
9 circumstances? Okay. Let's put that --

10 MS. LUKASIEWICZ: Okay.

11 THE COURT: -- possible quarrel aside.
12 What I want to know is what can you point to in the
13 record that even suggests that the Epstein
14 attorneys were acting in bad faith?

15 MS. LUKASIEWICZ: I think their repeated
16 representations that it was an accurate class list.

17 THE COURT: Well, they believed it was an
18 accurate class list. I mean, how does one infer
19 bad faith from turning over a class list in March,
20 and then they're out of the case at the end of
21 March, and, you know, we subsequently learned
22 something about how those errors occurred. But how
23 can one reasonably infer from the fact that there
24 was a class list that was inaccurate and, you know,
25 within a matter of less than four weeks they're out

1 of the case that they acted with bad faith. It's
2 not a question of negligence or --

3 MS. LUKASIEWICZ: Sure. I think when
4 counsel at the time from our office called and
5 inquired into that this did not seem like the
6 accurate class list, that we had, I believe,
7 initially 200,000 people were named on it. And, in
8 fact, counsel had represented at various points it
9 was closer to 30,000. So I think at that point
10 certainly, and when they're following back up and
11 saying, no, no, this is the correct list, and that
12 starts a large cycle of work, as we know, that
13 continues. So I think certainly at that point that
14 those requests are being triggered, they have an
15 obligation to certainly look into it. And it
16 certainly appears that they did not, since they
17 continued to make representations that it was an
18 accurate class list.

19 THE COURT: Okay. But the fact that it
20 starts, as you said, this large cycle, I'm not sure
21 that that has any relevance to whether they acted
22 in -- in bad faith.

23 MS. LUKASIEWICZ: Well, I think --

24 THE COURT: I think what you're saying is
25 the fact that there was such a significant

1 discrepancy between the number of people that they
2 had -- as I understand it, that they had discussed
3 with you, they reasonably expected to be on the
4 class list, and the number that was, in fact, on
5 the class list --

6 MS. LUKASIEWICZ: And there were
7 subsequent inquiries into it. It didn't stop there
8 that we took that class list and mailed it out.
9 There was subsequent inquiries as to how could this
10 list be so different from what was initially told
11 us? And there was assurances that no, this is the
12 correct list. So I think maybe if all of those
13 factors did not join together, you know, that may
14 be a different circumstance. But this is not in
15 isolation that they handed us a list, and we sent
16 it out where you may read some cases out there that
17 I do think exist. This is different. This is
18 where there's assurances it's correct. We're
19 following up and saying hey, this seems like an
20 excessive amount, and we're -- we're assured, no,
21 this is correct.

22 THE COURT: What -- have you been able to
23 find any cases that illuminate the question of the
24 extent to which an attorney may properly rely on
25 his or her or their clients, at least in the first

1 instance, in preparing a class list in a case like
2 this, a case like this where the class lists
3 consists of people who were employed by the
4 defendant company?

5 MS. LUKASIEWICZ: Not that I'm aware of
6 right now. And certainly we can address that
7 later, at a later date if you prefer.

8 THE COURT: Well, my question is, is it
9 your contention that the Epstein attorneys failed
10 in their duty in the preparation of the list or
11 that they failed in a duty that they had once
12 potential errors were brought to their attention?

13 MS. LUKASIEWICZ: I think both. We would
14 say that it's both, the initial preparation and the
15 failure to correct those once-raised issues upon,
16 and certainly being aware that it was incorrect.

17 THE COURT: Okay. But you haven't been
18 able to find any cases -- or you haven't found any
19 cases that deal specifically with the question of
20 what an attorney's obligation is with respect to
21 complying with a court's order that class lists be
22 turned over?

23 MS. LUKASIEWICZ: I mean, other than what
24 I can say is I certainly they have an obligation as
25 officers of the court to represent things

1 accurately and do their -- do their job. But I
2 have not looked into that specifically, but I
3 certainly can if the Court wants any research on
4 that.

5 THE COURT: With respect to the question
6 of fees and costs, what are the total amount of
7 fees and costs that are at issue in this motion?
8 Do you have that information?

9 MS. LUKASIEWICZ: I don't have that in
10 front of me. Obviously we prepared that for
11 mediation purposes or anything like that, but it is
12 not submitted in our brief.

13 THE COURT: Okay. If I, at the end of the
14 day on this motion, were to agree with you that
15 counsel is responsible for some dereliction of duty
16 that gives rise to costs and fees, but that that
17 dereliction of duty occurred during a narrow period
18 of time than you say for the year and a half that I
19 think you're -- close to year and a half, year and
20 three months that you're seeking sanctions -- how
21 do I decide what fees and costs should be assessed
22 relative to something less than the whole kit and
23 caboodle that you're arguing for?

24 MS. LUKASIEWICZ: I mean, certainly for
25 our purposes, our fees are obviously broken down

1 and categorized. You know, I have personally done
2 that, so various issues. So I think it certainly
3 depends on what the Court believes. I mean, we
4 believe that the last 18 months out of the normal
5 litigation, you know, any of that behavior is
6 sanctionable. But it could easily be specified for
7 certain conduct. We just think it's difficult,
8 because things aren't often in isolation and that
9 becomes very difficult. The amount of phone calls
10 and mail and things like that just from each
11 mailing is quite significant, and that starts, you
12 know, a lot of other issues that come off of that.
13 The motion to compel, for example, that we raised
14 when the second class list -- and I don't even know
15 what version it was, but the version that Fisher
16 Phillips provided, you know, that was conversations
17 with counsel significantly before the motion
18 itself. And then there was a lot of subsequent
19 conversations, and as we know, we didn't get the
20 class list till April. We first raised the list in
21 March of that year. So it's quite a few months,
22 and, you know, we can isolate them. But I'm just
23 saying that often the issues fall into each other
24 and continue to start the next potential isolation.

25 THE COURT: Okay. But that evidence is

1 not before the Court at this time as to --

2 MS. LUKASIEWICZ: Correct. Because,
3 again, we think all behavior during this time is
4 sanctionable. We did not parse it out because --

5 THE COURT: Okay. If -- if the company
6 were here, I have no doubt that you would be
7 arguing strenuously in support of the imposition of
8 sanctions against the company and perhaps against
9 counsel as well. I'm not going to suggest that you
10 wouldn't be looking for an imposition of sanctions
11 against counsel. But my question is how do I
12 approach the question of apportioning
13 responsibility?

14 MS. LUKASIEWICZ: So, you know, I think
15 from our perspective, I mean, if we look at the,
16 you know, candor to the Court and various
17 representations both made to the Court and
18 plaintiffs' counsel as to the accuracy of the class
19 list or in regards to the June 6th hearing, we
20 believe that those are -- you know, can be very
21 clearly tied to defense counsel. They were the
22 ones making the representations. They were the
23 ones indicating that there was only a few people
24 who were errors on the class list. So, I believe
25 that, you know, it's easy to tie it to counsel.

1 But, again, if we think that an evidentiary hearing
2 certainly could be appropriate if there's any
3 issues that need to be more fully developed on the
4 record, we certainly can do so. But we think it is
5 clear based on the current record that --

6 THE COURT: So you think that the record
7 here justifies an award of a hundred percent fees
8 and costs against counsel?

9 MS. LUKASIEWICZ: Yes, your Honor.

10 THE COURT: Okay. I have gone through the
11 questions that I had for you. Do you have anything
12 else that you want to add at this time?

13 MS. LUKASIEWICZ: No. Again, we would
14 just say that, you know, we think with the Second
15 Circuit's history, as I said before, that an
16 evidentiary hearing is appropriate, but I've raised
17 that already.

18 THE COURT: All right. Thank you.

19 All right. Which of you would like to start?
20 Okay, Mr. Bauer, you're being pointed to.

21 (Indiscernible cross-talk.)

22 THE COURT: Mr. Farella, why don't you
23 come up here to the podium.

24 MR. FARELLA: Thank you, your Honor. Your
25 Honor, thank you, again, for allowing me to appear

1 and argue this motion.

2 THE COURT: And I should -- and I should
3 apologize, because I did not look at the docket
4 sheet to refresh my recollection as to whether you
5 represented the defendant in the action.

6 MR. FARELLA: I did not.

7 THE COURT: You did not.

8 MR. FARELLA: No.

9 THE COURT: You're just sanctions counsel?

10 MR. FARELLA: I'm deputy general counsel
11 of Epstein Becker and Green. So in these types of
12 motions, I do appear on behalf of the firm.

13 THE COURT: Okay. All right. Thank you.

14

15 MR. FARELLA: Thank you, your Honor. Your
16 Honor, I think your colloquy with plaintiffs'
17 counsel sort of hinted at a number of issues that I
18 want to address very briefly. I believe they are
19 addressed in our briefing, but the factors that are
20 underlying these requests for relief, I know they
21 toss around the idea of negligence, but there has
22 to be some type of culpable conduct, a level of
23 intent or maliciousness that is just not present in
24 the record against Epstein, Becker and Green. As
25 described in Epstein, Becker and Green's brief as

1 well as in the submissions by Ignite's present
2 counsel, those underlying facts of what Epstein
3 Becker did in this extremely small window that they
4 were involved in this case do not demonstrate any
5 flouting of a court order, any type of
6 misrepresentations. Misrepresentations would be
7 knowing the facts are true in one respect and
8 misrepresenting those truths to another person in
9 order to induce them to do something. That simply
10 was not the case here. As the Metzger affidavit
11 sets forth, Ignite's in-house counsel had prepared
12 these -- had prepared these lists and assured
13 everyone those lists were correct, and that's where
14 the basis of the representations that Epstein
15 Becker attorneys did, came from.

16 Now, in our brief it was before Mr. Metzger had
17 put the submission in, we had put a footnote saying
18 we had concerns about attorney-client privilege
19 and, you know, describing the conversations that
20 occurred, but you certainly could see the
21 implications from Mr. Metzger's affidavit where he
22 states that we believe -- we did not discover --
23 Ignite did not discover these errors until later.
24 Epstein Becker was already out of the case. At the
25 time Epstein Becker was being told this is the

1 accurate list of all of our employees and we handed
2 it over. When questioned, we go back, the same
3 list is recompiled in a more efficient way we
4 thought. And as Mr. Metzger says in paragraph 6 of
5 his affidavit, the same error ended being
6 compounded because no one recognized that there was
7 this extra file.

8 THE COURT: Okay. Let me ask you the same
9 question that I asked Miss Lukasiewicz. Did
10 counsel have a duty to supervise, oversee the
11 production of the class list?

12 MR. FARELLA: Did counsel, meaning Epstein
13 Becker?

14 THE COURT: Yes.

15 MR. FARELLA: Okay. Well, I believe that
16 the duty -- we fulfilled that duty, because we go
17 to the client, we say to the client we need this
18 list of employees. This is not something that's in
19 Epstein Becker's control. The client provides us
20 lists. We get the lists. Frankly, surprised by
21 the size, because, again, we're not walking away
22 from the idea that we had a thought that it was a
23 smaller list of people. We questioned the counsel,
24 we get back from them the same list, and they say
25 this is our list. This is accurate. I don't know

1 how Epstein Becker can go in and say to the client,
2 I need to look at all of your underlying employment
3 data.

4 THE COURT: No, but what counsel can do is
5 say tell me how this was put together.

6 MR. FARELLA: Right.

7 THE COURT: Tell me how do you reconcile
8 the fact that you believe there were going to be
9 30,000 employees that met this definition and now
10 you're giving me 200. We need an explanation for
11 that. So I'm not suggesting that the law imposes a
12 duty on counsel to go to a client's office and work
13 with the files and essentially compile the list
14 himself or herself. But the question here is, you
15 know, what supervision occurred, what questions
16 were asked. When there was a discrepancy of a
17 magnitude of a difference between 30,000 and
18 200,000 people, is it enough to just say, can you
19 tell me is it accurate? Oh, it is? Okay, thank
20 you. Does that discharge counsel's -- and I don't
21 have any information about what Epstein did or
22 didn't do in the course of inquiring into that.

23 MR. FARELLA: Correct. You don't, your
24 Honor. And I certainly can proffer here. But I
25 think the Metzger affidavit actually sets forth

1 the, what can be implied, which is questions were
2 raised. Epstein Becker was told it was the merger
3 of two different lists that came from two different
4 payroll accounts. That accounted for the
5 ballooning of the list and the fact that it was in
6 such disarray originally. Then when it was recast,
7 they were told that that's the sole reason for why
8 it was done.

9 THE COURT: And when it was recast, it
10 went from what number to what number?

11 MR. FARELLA: I don't recall the exact
12 numbers it was recast. What we did is compiled it
13 from 250 individual spreadsheets --

14 THE COURT: Right.

15 MR. FARELLA: -- I believe into one spread
16 sheet.

17 THE COURT: Right.

18 MR. FARELLA: And I don't think the number
19 changed -- I don't want to make a representation.
20 But I don't believe the number changed between the
21 two lists that the Epstein Becker firm gave to
22 them. But I think just the number of spreadsheets
23 changed.

24 Now, again, Epstein Becker never had the
25 ability to even go further. From the time that the

1 list was actually compiled in the original -- in
2 the original form that it was compiled, until the
3 time that Epstein Becker was given notice that
4 there was a problem from plaintiffs' counsel and
5 started to investigate it, it was only a couple of
6 weeks. And Epstein Becker was then out of the
7 case. And during that time, as Mr. Metzger's
8 affidavit states, Epstein Becker was being told
9 that this list was accurate and this -- it was
10 compiled in this sort of, you know, two -- merger
11 of two lists and came together, and that's what
12 resulted in the greater number of people that were
13 part of it that originally we did not anticipate.

14 But then Epstein Becker's out. And new counsel
15 is left with the unenviable task of having to clean
16 this up. And as we've learned through the process,
17 and I've learned from just reading the cold record,
18 that it took months and months and months beyond
19 that to even find the error and to correct it. And
20 even knowing that there was an error and knowing
21 that there were too many people, it was still
22 difficult to finally cull that list down.

23 So to visit upon Epstein Becker who was in the
24 case for just a couple of weeks on this issue, to
25 say then that they were somehow derelict or in a

1 way didn't discharge their duties seems to be
2 rather unfair, because Epstein Becker did not have
3 the opportunity to, one, discover the problem and
4 try to remedy it. We were just somewhat,
5 unfortunately, only in the case for a very brief
6 time on this issue.

7 THE COURT: With respect to the motion as
8 against Epstein, do you believe that a hearing is
9 required or justified?

10 MR. FARELLA: I do not. I think, in fact,
11 your Honor can use discretion as to whether the
12 Court has enough before it to make a decision
13 that's based upon the facts. In this case --

14 THE COURT: Do you -- have you put
15 everything before the Court that you think is
16 necessary for the Court to make that determination?

17 MR. FARELLA: I do, your Honor. Besides
18 the -- and relying upon also the submissions by, I
19 guess, co-counsel at this point, but previous --
20 subsequent defense counsel, since we were the
21 previous counsel, I would submit that there is
22 enough here to determine Epstein Becker's --
23 Epstein Becker's state of mind and how they
24 proceeded with the case, yes, I do.

25 THE COURT: Let me ask you a slightly

1 different question. If -- let's assume for the
2 moment -- and I certainly have not made this
3 finding -- but for purposes of this question just
4 assume with me that I found that there was a duty
5 that Epstein had and that Epstein did not
6 adequately discharge that -- that duty to be more
7 involved in suit creating or supervising or
8 investigating errors in the March 2015 class list.
9 And let's assume we're looking at this as a
10 question of Rule 16 sanctions. Costs and fees are
11 generally required to be reimbursed where there has
12 been a violation, unless the conduct was
13 substantially justified or an award of costs and
14 fees would be otherwise unjust. That's the
15 language that I'm sure you're familiar with. Is
16 there any other evidence with respect to that
17 consideration? I've looked at cases, and there are
18 certainly a number of cases. I haven't done a full
19 canvassing, but a number of cases that would
20 indicate -- and this is sort of consistent with
21 what I thought they would say -- that on that
22 particular question it would be the violators,
23 because it would depend on the court finding that
24 there's been a violation, that it's the violator's
25 burden to show that such an award would be unjust,

1 or that their conduct was substantially justified.

2 MR. FARELLA: Correct.

3 THE COURT: Do you -- do you feel as if
4 the record before the Court is adequate from your
5 perspective on that issue? And if so, what would
6 you point me to to illuminate that determination?

7 MR. FARELLA: Sure. So I do believe that
8 it is adequate on that perspective. I think that,
9 first, just the temporal issue of how long Epstein
10 Becker was in the case on this issue between the
11 time when the list was provided, the question that
12 got raised, and then the attempts to try and
13 resolve it, and then we were gone. We were out of
14 the case. So the ability to try and even remedy it
15 even further was lost to us. And so visiting
16 sanctions upon us would, in fact, be unfair in that
17 situation. Because again, the Metzger affidavit at
18 paragraphs 4 through 6 sets forth how it is that
19 these lists were created and the representations
20 that were being made from our client to us, meaning
21 Epstein Becker, about the lists, and it -- and, you
22 know, in response to our inquiries. And that alone
23 demonstrates that we were not conducting ourselves
24 improperly before the Court. We were -- we were
25 telling the Court and counsel the truth as we knew

1 it at the time. And I think that that -- there's
2 enough evidence in the record at this point in time
3 that would allow this Court to make that
4 determination.

5 THE COURT: Okay. All right.

6 Mr. Farella, anything else you do want --

7 MR. FARELLA: I do have one piece. It was
8 raised about the settlement in the bankruptcy. And
9 I call your Honor's attention to Exhibit I that was
10 filed with the Metzger affidavit. Paragraph 8 of
11 the settlement that took place in the bankruptcy
12 court says releases. And, you know, typically in
13 settlements we have -- as lawyers we have these
14 general releases that start from basically the day
15 the earth cooled to the effective date and
16 encompass all claims at all times, and that's the
17 type of release that we have in this case. And it
18 says that -- in plain language that all claims are
19 resolved against all parties and their agents and
20 attorneys. But there's a specific carve-out for
21 the Fisher Phillips people. And I apologize to
22 them for that. But there is a specific carve-out
23 for them. And so it was contemplated by
24 plaintiffs' counsel that they needed to make that
25 specific carve-out. And here --

1 THE COURT: Can you read me the carve-out?

2 MR. FARELLA: Absolutely. It says,
3 attorneys, parentheses, excluding Brian
4 Gershengorn, Melissa Osipoff, and Seth Kaufman of
5 Fisher Phillips, LLP, and previously associated
6 with Ogletree, Deakins, Nash, Smoak and Stewart,
7 Fisher and Phillips LLP, and Ogletree, Deakins,
8 Nash, Smoak, and Stewart, PC, end parentheses.

9 There's nothing in their that excepts out Epstein
10 Becker and Green, Kenneth Kelly, Jeff Ruzal or any
11 other Epstein Becker attorney. This -- it also
12 has -- this settlement agreement has the typical
13 entire agreement merger clause at the end that says
14 this encompasses our entire agreement. All parties
15 were involved. All parties had counsel. All
16 parties signed off. I believe that that has
17 preclusive effect on the plaintiffs from seeking
18 costs and claims against Epstein Becker. But with
19 that, I have no further --

20 THE COURT: Okay.

21 MR. FARELLA: Thank you, your Honor.

22 THE COURT: Okay. Thank you. I'm going
23 to take a five-minute recess before I come back to
24 you, Mr. Kelly [sic].

25 (Short recess was taken.)

1 THE COURT: Please be seated. Okay.

2 Mr. Bauer.

3 MR. BAUER: Good afternoon, your Honor.

4 THE COURT: How are you?

5 MR. BAUER: Your Honor, we're here after a
6 series of procedural steps that the Court has
7 implemented to address this final issue in a case
8 that's taken on, respectfully, kind of a life of
9 its own, which is something that the circuit is
10 very cautious about. But the Court addressed this
11 issue back in September of 2016 and gave
12 plaintiffs' counsel the option of how they wished
13 to proceed in presenting this sanction issue. And
14 it was the choice at that point was do you want
15 oral testimony -- and this was at the conclusion of
16 the 30(b)(6) examination of Miss Moore. Do you
17 want to proceed by way of written -- oral
18 testimony, live testimony, or do you want to
19 proceed by way of writing? And the plaintiffs'
20 counsel at that point opted when -- after various
21 descriptions of the parade of horribles that they
22 had said existed here, that they would lay them
23 bare in their -- in their motion and pursue this in
24 a written form.

25 That motion followed in March of 2017. And

1 following the bankruptcy proceedings, this -- the
2 Court asked that we address that early in this
3 year, 2018. And defendants responded to that
4 motion, although the motion was then a year old,
5 and obviously significant events had occurred in
6 the interim with the Ignite filing for bankruptcy
7 protection and the ultimate settlement of the
8 underlying merits of the litigation.

9 In February of this year, the plaintiffs -- or
10 defendants submitted a detailed briefing and
11 factual support in opposition to each of the
12 allegations that had been raised that support the
13 argument of sanctions, and argued I think very
14 strenuously that plaintiffs had not met their
15 burden of showing that the behavior which they were
16 complaining of, counsel's behavior, because that,
17 that's all that's left is the Fisher Interested
18 Parties, rose to the level of a violation that
19 warranted sanctions, which is -- is a significant
20 and important component when another member of the
21 bar accuses a member of the bar of behaving in such
22 a way that it is for the purpose of harassment or
23 for delay, or that someone intentionally
24 misrepresents or intentionally behaves in such a
25 way that violates their -- their oath and their

1 duty to the Court, that these -- these sanctions be
2 imposed. And in response to that submission by the
3 defendants, there was some detailed conversations
4 with the Court, and the plaintiffs withdrew their
5 motion.

6 Presumably when they refiled that motion it
7 would have been seasonably updated to reflect what
8 had happened and would have also addressed the
9 various concerns and issues that the defendants had
10 laid bare in their February submission. But none
11 of that happened. The motion in its form from
12 March of 2017 was merely resubmitted.

13 Defendants again replied making their arguments
14 and indicating to the Court I think most
15 strenuously that the plaintiffs had not met their
16 burden to even shift the duty over to the -- to the
17 defendants to establish that there were -- there
18 was conduct here that would warrant sanctions.

19 And I point to the Court's discussion about bad
20 faith. I think the Seltzer decision which was
21 cited in the two-page reply that we got in response
22 to -- I think that was about the fifth time that
23 the plaintiffs could have addressed the various
24 factual issues that had been raised. The two-page
25 reply affidavit -- brief that we got said well,

1 Seltzer requires a hearing. But Seltzer's got some
2 real important language that I think hones in on
3 why this is such an important and significant
4 matter. Seltzer says that while the Second Circuit
5 reviews the court's decision as an abuse of
6 discretion, it urges the district court or the
7 lower courts to exercise restraint and care with
8 their discretion when it comes to the issue of
9 sanctions.

10 It also points to the fact that when an
11 attorney as an advocate is acting on behalf of
12 their client, under 1927 there has to be a finding
13 of bad faith. And under the inherent powers of the
14 court, Seltzer says there should be conduct akin to
15 bad faith when the attorney is acting as an
16 advocate. And there's not a single notion in any
17 of the papers that -- that the plaintiffs have had
18 ample opportunity to provide that suggests that any
19 of the Fisher Interested Parties ever acted in bad
20 faith or intended to harass or intended to delay or
21 act in a vexatious manner that would warrant the
22 very, very serious sanctions that are being sought
23 here.

24 And, frankly, from my standpoint, even today
25 when the Court poses the issue of what would we

1 have a hearing on, no grounds or facts can be
2 established or even articulated on the record that
3 supports that. And, in fact, the one example that
4 plaintiffs' counsel used was a statement made by
5 Mr. Gershenheim [sic] at a conference with the
6 Court that he misrepresented some fact about the
7 list. And -- and that transcript, your Honor,
8 which is part of our exhibits, and it's -- it's the
9 first thing that Mr. Gershengorn says is I think
10 it's the latter, your Honor. I honestly don't know
11 the scope of that yet. I mean, how that language
12 could be interpreted as a misrepresentation to the
13 Court is he lays out the fact that he doesn't
14 honestly know at that point and is hesitant to make
15 any statements on the record that might be
16 considered to be misleading.

17 I think the submissions that we've made,
18 Mr. Metzger's declaration, the transcripts that
19 have been placed into the record, none of that,
20 none of that is remotely addressed or controverted
21 by the plaintiff, despite the fact that they've had
22 multiple opportunities to address those. And to
23 say that now we can brief it later, we can have a
24 hearing, it's -- it's too late in the game. The
25 Court set the path on this application, gave the

1 plaintiffs every full and fair opportunity to
2 present their evidence, and quite frankly, they
3 failed to meet their burden. It shifts over the
4 burden of persuasion to the defendants.

5 THE COURT: All right. So, just to be
6 crystal clear on that, the defendants' position is
7 that no hearing is either required or justified?

8 MR. BAUER: Yes, your Honor. And the only
9 evidence that the -- that the defendants have been
10 constrained and been unable to present at this
11 point would be attorney-client communications that
12 would be -- that may be probative to some of these
13 issues. But, quite frankly, we didn't address that
14 issue from the simple fact that we don't believe
15 that the defendant -- excuse me, the plaintiff
16 has -- has even met the burden on a threshold issue
17 of any conduct or behavior that falls under either
18 Rule 16, Rule 37.

19 THE COURT: All right. Well, under
20 Rule 16 there's no showing of bad faith required.

21 MR. BAUER: There is not, your Honor,
22 you're correct.

23 THE COURT: You agree with that?

24 MR. BAUER: That's correct.

25 THE COURT: And I think it's -- well, let

1 me ask you these questions in the order in which I
2 have them.

3 MR. BAUER: Okay.

4 THE COURT: And, you know, if you have
5 other argument, I'm certainly happy to hear it.

6 MR. BAUER: That's fine, your Honor.

7 THE COURT: I think this, you know, this
8 case raises a question that I have not found any
9 cases that have dealt with it at least head on.
10 You know, what is an attorney's duty and
11 responsibility with respect to compliance with a
12 court order requiring that attorney's client to
13 provide a class list so that notice -- very
14 important notice is sent to those persons, and they
15 can make a decision about whether to opt in to that
16 litigation or not. And I think that there -- and
17 I'm interested in your answer.

18 Let me just say that in terms of my thinking
19 about it, I break it down into three different
20 parts. One is, you know, did the duty -- did the
21 attorneys have the duty to inquire as to the
22 accuracy of the class list after plaintiffs raised
23 concerns regarding its size? That's an issue that
24 I think is more directly raised with the Epstein
25 attorneys, and we talked a bit about that. Second

1 question is did the attorneys have a duty to
2 oversee or supervise the production of the second
3 class list, that would be the July 2015 class list,
4 that purported to correct the error in the first
5 list? And then third, did the duty -- attorneys
6 have a duty to inquire and investigate into the
7 accuracy of the July 2015 class list after
8 plaintiffs raised concerns regarding its accuracy
9 in March 16th? And did they have a duty then to
10 become involved in supervising or more the
11 investigation into those alleged inaccuracies? And
12 when I think about it -- and again, I haven't found
13 any case law that -- that addresses this directly.
14 It seems to me to make some logical sense to begin
15 with the proposition that giving substantial
16 latitude to one's client, substantial deference to
17 one's client initially to say here is the
18 definition of the class list, it's people who
19 worked at your company or your restaurant from this
20 period to this period or in these stores. You go
21 to your people at the company and come back to me
22 and give me a class list. I may be wrong about
23 this, but, you know, my thinking is logically it
24 makes sense that at the beginning of that process
25 it wouldn't be unreasonable to give considerable

1 deference to the client to prepare that list and to
2 say that these are our employees who meet the
3 definition.

4 But at some point when it is clear that they
5 haven't done that and they have failed
6 significantly, at least in terms of numbers, it
7 seems to me further logical to assume that an
8 attorney's duties and responsibilities then are
9 heightened and sharpened, and they then do have an
10 ongoing responsibility of management and
11 supervision to ensure that the Court's order is
12 being complied with.

13 You see a sort of similar analysis in the
14 litigation hold scenario, where, you know, you
15 issue a litigation hold notice, but that's not
16 enough to discharge counsel's responsibility. They
17 have to make sure that it's being executed
18 properly. If there are problems that are raised,
19 they have to get involved. That seems to me, you
20 know, in a big picture, what -- what has happened
21 here. And as you know, because you're very
22 familiar with the record, on a number of occasions
23 and with, you know, I would say, you know,
24 increasing intensity as the case moved on, I
25 expressed greater and greater frustration that we

1 could not get an accurate class list.

2 And so you put a lot of reliance on the Metzger
3 affidavit, which strikes me as a little bit of a
4 double-edged sword. I mean, on the one hand when
5 attorneys are being accused of bad faith -- and I
6 agree with you that that's a very serious charge to
7 be leveled at an officer of the court -- to be able
8 to say, you know, it wasn't involved in that, makes
9 sense that that would be a response to bad faith.
10 No, I wasn't misrepresenting. I didn't know the
11 facts. You know, and I don't want to completely
12 discount that as a concern of the Court. But I
13 will say, at least as I sit here today, I have a
14 greater concern about whether the record gives rise
15 to a reasonable inference that counsel did not
16 adequately discharge its duty of supervision and
17 management of compliance with the court order. And
18 to say we can't have anything to do with it to some
19 degree kind of proves that more than it -- it may
20 refute bad faith, but it -- so -- put a lot of
21 questions in there, but I'm curious as to -- as to
22 how you see those principles applying to the
23 preparation of a class list in compliance with an
24 order of the court.

25 MR. BAUER: I think your -- your

1 discussion with Epstein's counsel and kind of
2 segregating that first piece of the original list,
3 I don't think that -- that that duty -- I think
4 it's say fair, as you've said, to rely on the
5 client who's most familiar with the systems and the
6 way the payroll records were maintained and who --
7 who -- who was responsible for those. It's fair to
8 put that initial burden on the -- on the client.
9 And we know from Metzger and we know from
10 Miss Moore's that this was not a press of a couple
11 of buttons and out spit the list of these various
12 seasonal and temporary and short-term workers that
13 may have worked in these restaurants.

14 I think getting to the second point that once
15 the first list came out and folks looked back and
16 said, gee, now it's 2,000 people, how did we get
17 from everybody thinking that it was 30,000 to
18 200,000 --

19 THE COURT: Right.

20 MR. BAUER: -- is, to some degree, a
21 little bit of a temporal issue for the Fisher
22 Phillips Interested Parties as well. Because they
23 actually first -- I think a notice of appearance
24 was filed in April of that year. And -- and the
25 process had begun to say what went wrong, and the

1 counsel, at least from Mr. Metzger's description
2 said we've got this. We'll go back and go through
3 what we did, and that will be a way to reconcile
4 what we did wrong. And I think that that resulted
5 in the list that was tendered in I believe July.
6 And it took everyone a significant period of time
7 following that, comparing those lists and
8 determining ultimately what errors may have existed
9 in -- in that list.

10 Again, being constrained to some degree by
11 attorney-client privilege, I'm -- the Fisher
12 Phillips' parties and lawyers did not sit on their
13 hands and say there's nothing we can do to get this
14 list accurate. I think they --

15 THE COURT: Okay. But I don't have
16 anything in the record about -- about what they
17 did. I will say that with respect to the July 2015
18 class list, my recollection of that -- and I didn't
19 go back and look at all the docket entries on
20 that -- was that I had a number of telephone
21 conferences I think in the summer of 2015 with
22 counsel about getting that class list accurate.
23 And there were -- you know, there were a number of
24 letters that were sent to the best of my -- to the
25 best of my recollection, and I certainly, you know,

1 had conversations with counsel about the need to
2 get that class list, you know, prepared and to get
3 the errors corrected.

4 I don't -- and, you know, I don't think it will
5 come as a surprise to you, because it's pretty
6 evident from the face of the transcript of the
7 May I think 16th or 17th, 2016, hearing, you know,
8 I still look at that transcript, and what I take
9 away from the transcript, more than the question of
10 how many people were affected, you know, which
11 we've talked about in the past, is what seems to me
12 to be a pretty stunning lack of information about
13 what is going on with the list. I mean, that's --
14 and, you know, in part, I'm putting you on notice
15 that I think that that transcript gives rise to a
16 reasonable inference that counsel has not met its
17 obligations to be involved in the -- to be properly
18 involved in the correction of the errors and the --
19 and the preparation of an accurate class list.

20 Now, certainly those reasonable inferences
21 could be wrong. But what I'm saying is I don't
22 have any information. I don't have -- you know, I
23 have a Metzger affidavit that basically says, you
24 know, in-house counsel prepared that July 2017 list
25 with no one else's help. And then I have a hearing

1 in May of 2016 in which counsel says I don't really
2 know -- I don't know the scope of the -- of the
3 errors, and I don't know the cause of the errors,
4 and I would say, you know, did not -- at least
5 didn't tell the Court when I said we're going to
6 have a hearing and have somebody from the company
7 testify, we don't have anybody who can tell you
8 about that. That, to me, is some admission that
9 they didn't know facts that I would expect counsel
10 to know, given the fact that we were a year and a
11 half past Judge Siragusa's order and this was, you
12 know, the third time around.

13 So I want to make sure, you know, if -- if --
14 if there is evidence that you think that -- that I
15 should hear with respect to, you know, counsel's
16 involvement in that process, that you've put it
17 before the Court, because those are the inferences
18 that seem reasonable to me. And I don't have
19 evidence -- I don't think I have evidence that --
20 that refutes those inferences.

21 MR. BAUER: Well, I think, your Honor,
22 that -- and I'm -- I'm -- I just want to pause for
23 a moment, because there was a statement in -- in
24 plaintiffs' motion that attributed that during the
25 period, or several months in -- in 2000 -- between

1 2015 and in 2016 when you had that -- that hearing,
2 that both sides were working what I would describe
3 as behind the scenes trying to determine the
4 accuracy of that -- of that second list. And the
5 discussions about the -- who then plaintiffs'
6 counsel could be communicating with, and whether
7 notices had to be returned and lists had to be
8 returned. And you do have Miss Osipoff's
9 declaration that was submitted in advance of the --
10 the hearing on the 6th or the meeting with the
11 Court on the 6th that detailed at least efforts and
12 responses to what she knew at that time.

13 THE COURT: I think -- I don't have
14 Miss Osipoff's affirmation in front of me. I'm
15 sure I've got it in the stack here somewhere. My
16 recollection is that that affidavit dealt with what
17 she was doing to prepare a third list. Am I right
18 about that?

19 MR. BAUER: Yes, your Honor.

20 THE COURT: Okay. I don't think the third
21 list is -- is at issue. From my perspective right
22 now, you know, any issues relating to the third
23 list have been put to bed. We had a hearing on
24 that. I issued a decision on that. I don't think
25 the record before me has raised any issues that

1 would merit my quarreling with anything Miss
2 Osipoff did. If Miss Osipoff had prepared the
3 first list, I think we wouldn't be here. And
4 that's kind of my point. You know, she got
5 involved. I ultimately questioned whether, you
6 know, she should have worked with somebody from the
7 company so we didn't get into that other issue
8 about not having somebody for the hearing. But
9 ultimately she got very involved, and there's
10 nothing in the record that suggests to me that she
11 didn't do what she was supposed to do, and that the
12 third class list that was prepared was -- was
13 either fully accurate or so substantially accurate
14 that there are no issues.

15 So, I think, you know, her affidavit doesn't
16 shed any light on what happened up to the point
17 that she -- and I think the record before me now
18 says the hearing that occurred in May occurred
19 either the 17th or 18th of May here.

20 MR. BAUER: Yes.

21 THE COURT: That Miss Osipoff essentially
22 took over the -- and started the preparation of an
23 entirely new list, the third list, either that very
24 day or the next day. And I don't think the record
25 before me raises any questions with respect to the

1 preparation of that third list. But I think the
2 record has precious little in it with respect to
3 what, if anything, counsel was doing from, lets
4 say, March of 2016 when plaintiffs filed a motion
5 that said hey, there's some inaccuracies. And my
6 best recollection is the defendant said well,
7 they're really limited. There's no big deal and
8 there's always a few -- you know, a handful of
9 errors. And lo and behold there were some pretty
10 substantial inaccuracies in it.

11 But there's nothing in the record that gives me
12 any indication that counsel was working with --
13 with their client to address those inaccuracies, to
14 correct those inaccuracies, in a meaningful way, in
15 a way I think that would discharge their duty.

16 MR. BAUER: Again, your Honor --

17 THE COURT: Now, do you have a -- do you
18 ever a -- is the privilege applicable? The case is
19 over as to the company.

20 MR. BAUER: But the --

21 THE COURT: Sanctions are not sought
22 against the individual defendants. Is there any
23 question as to whether your clients are bound by
24 privilege from saying, you know, this is -- number
25 one, this is what I did, and number two, this is

1 what I told my clients to do with respect to the
2 preparation of the list?

3 MR. BAUER: Well, I think, your Honor, I
4 do think that -- that the client is the only one
5 who can waive that privilege. And the client is
6 not party to this proceeding or even bringing the
7 claim, but rather an adverse party that's seeking
8 to recover those. And those communications with
9 the client involving what -- what we did and what
10 we were telling the client and what the client was
11 telling us during that period of time would be
12 privileged.

13 And -- and I think that's one of the
14 constraints, and this -- this was addressed in --
15 in a couple of the proceedings before your Honor,
16 including the hearing that was targeted for the --
17 the June 6th time frame was that what could be said
18 about the -- because at that point Ignite had not
19 filed for bankruptcy protection. They were still
20 an active patient in the proceeding. And the
21 ongoing communications were subject to motions
22 and -- and applications for sanctions and costs at
23 that point.

24 So I think it -- it does put the attorneys at
25 that time, and now, in a position where to disclose

1 client communications I think is -- is a -- there
2 could be, I guess, in camera presentation to the
3 Court as to what was happening at that point, but
4 the privilege is of the client's to waive. And I'm
5 not aware of that -- that that's happened. In
6 fact, there's an application -- now that the
7 bankruptcy is completed, but two of the
8 individual -- there's application pending before
9 the Court to withdraw as their counsel. So, I --
10 and I --

11 THE COURT: Well, if I can return to the
12 point I was making, and again, it is because I
13 think we would all agree that the Second Circuit
14 has issued, you know, a number of statements of
15 guidance and counsel which are, you know, sometimes
16 challenging to follow in the details of these
17 particular issues. And, you know, I think
18 fundamentally one of the most important messages
19 from the Second Circuit is that when motions like
20 this are brought, it is essential to ensure that
21 those on the other side are given due process, that
22 is notice of what the alleged sanctionable conduct
23 is, and we went through that. And ultimately I did
24 order that there be further -- that there -- that
25 the notices of sanctionable conduct be supplemented

1 and an opportunity to be heard -- which is -- which
2 is where we are today.

3 MR. BAUER: Correct.

4 THE COURT: I think the fact that there
5 are attorney-client privilege issues which it seems
6 to me arise in every one of these kinds of
7 sanctions hearings is not a basis to say nah, their
8 privilege is here and so therefore the opposing
9 party doesn't have the right to seek sanctions,
10 because, you know, the privilege issues are too
11 thorny and difficult to work through, and it would
12 be -- it would be unfair. You know, I'm certainly
13 sensitive to the fact that I want to make sure that
14 your clients are heard as fully and thoroughly as
15 they are able to be heard on these issues. And so,
16 you know, part of my purpose today is to -- is to
17 put you on notice of the fact that when I go back
18 to that May hearing, those seem to be reasonable
19 inferences to draw from statements made by
20 Mr. Gershengorn to the Court.

21 It's not that I'm looking at a record of
22 nothing and saying, gee, I think it's fair to
23 assume that counsel wasn't involved in this
24 process. I'm saying I think it's fair to assume
25 from the facts and statements made at that hearing,

1 that counsel was not as involved in supervising the
2 preparation of an accurate class list as was
3 warranted by the facts of this case. And, you
4 know, if there's anything more that you want me to
5 hear on that, you know, I will certainly entertain
6 an application to -- to supplement the record, and
7 I -- you know, I hear that what you're saying is
8 you think there's nothing more than that you can
9 offer because of the constraints of attorney-client
10 privilege.

11 MR. BAUER: Well, your Honor, I'm looking
12 back at -- at the proceeding on the 17th, and I
13 guess to some degree to what the Court thought
14 Mr. Gershengorn's statements were that recognizing
15 that perhaps that they were not as involved as they
16 should have been. If the Court is alluding to the
17 fact that he couldn't say with certainty the extent
18 of the errors on the list, I think he was being
19 very, very cautious to avoid creating some notion
20 or -- or suggesting that there were events or
21 circumstances here that didn't -- that would
22 mislead the Court or others.

23 And I -- I think, Judge, to go back to a more
24 basic proposition, you made this kind of akin to
25 the -- to litigation hold. I -- I think that there

1 are oftentimes when counsel -- I mean, I can't
2 think of a case when counsel isn't working with
3 their clients in some form or another to comply
4 with a variety of obligations that the Federal
5 Rules provide, whether it be initial disclosures,
6 document disclosure, interrogators, or the like.
7 And then I guess you go back to the basic
8 proposition, Rule 16 says now was there a
9 disobedience of the court order? And -- and are we
10 imposing a higher -- that if there's delay or
11 inadvertence, is that a -- a disobedience of the
12 Court order?

13 THE COURT: And I'm not sure Rule 16
14 requires -- I mean, I thought about the way the
15 plaintiffs have framed their motion for sanctions.
16 Disobedience to me connotes willfulness. I mean,
17 you willfully are disobedient.

18 MR. BAUER: To me as well.

19 THE COURT: The plaintiffs also seek
20 sanctions for -- I don't know if it's continued,
21 persistent noncompliance with court orders, and I
22 would agree with plaintiffs that Rule 16 does
23 afford the Court the discretion to impose sanctions
24 for continued noncompliance with a court order that
25 may arise from negligence. So, I don't -- I

1 don't -- there doesn't have to be a finding of bad
2 faith under Rule 16. To the extent that
3 plaintiffs' motion seeks sanctions based on
4 disobedience, I know they would say that they think
5 that is a reasonable inference from the record.
6 But even if I were to disagree with them on that, I
7 think noncompliance alone can be a basis for
8 Rule 16 sanctions.

9 MR. BAUER: Again, obviously this was a
10 matter that was under the Court's supervision and
11 without lack of involvement on both counsel. And I
12 would accept the Court's invitation that a
13 post-hearing submission on that very narrow issue
14 of that period of time, and I can offer to the
15 Court what I think the record contains, that that
16 overrides the inference that -- that the Court has
17 drawn from that delay period. I don't think
18 that -- that the plaintiffs have necessarily
19 pointed to that particular set of events by the
20 defendants as a -- as a basis for sanctions, and
21 certainly wasn't articulated by counsel here or
22 specifically in the papers. I also think that --

23 THE COURT: You're talking about
24 non-compliance?

25 MR. BAUER: The Rule 16. What the Court

1 is specifically talking about in the period of time
2 that the Court is addressing.

3 THE COURT: Well, number two, specific
4 conduct at issue in the sanctions hearing, the
5 defendants' repeated failure to produce an accurate
6 class list in a timely fashion as directed by the
7 Court. I mean, that's what I interpreted that --
8 that number two to be directed at.

9 Again, if I can step back a little bit and say,
10 I mean, if we are -- and again, I acknowledge the
11 plaintiffs are seeking far greater sanctions than
12 this, and their view is that the conduct at issue
13 is more egregious than what I'm talking about right
14 now. But if we look at just the question of
15 noncompliance with Judge Siragusa's order, you
16 know, I think conceded failure to provide an
17 accurate class list until August of 2016, '16,
18 which was a year and seven months, a year and eight
19 months after Judge Siragusa's order, and we look at
20 the question of whether there -- the defendants
21 and/or their counsel -- or I should say their
22 counsel, because the defendants aren't here -- bear
23 responsibility for that noncompliance or bear some
24 responsibility for the noncompliance. And one of
25 the sanctions available to the Court is -- and

1 would be required to be imposed under the
2 circumstances are fees and costs. And it seems to
3 me, if you step back, it's almost a matter of
4 equity. All right. Judge Siragusa had an order
5 here. The order said you're going to give us a
6 class list of these people who fit this definition.
7 Inexcusably took a year and eight months to get
8 that right, notwithstanding two sets of counsel,
9 notwithstanding a number of -- I mean, many, many
10 conferences with the Court, motions and so forth,
11 who should bear the costs, literally, the costs and
12 the fees of what it took to eventually get that
13 class list? And judged that way, it doesn't seem
14 to me that what plaintiffs are asking for is -- you
15 know, offends basic, you know, notions of fairness
16 and equity. It seems fair and equitable.

17 You know, that is a separate question from
18 whether the record here justifies the imposition of
19 sanctions because counsel acted in bad faith,
20 counsel made misrepresentations on the record,
21 counsel failed to have a witness ready to go with a
22 hearing when the Court ordered it, and there was no
23 legal excuse for not having the witness available.
24 You know, those are all issues that are before the
25 Court.

1 But I think that, you know, the Court
2 throughout these proceedings tried to articulate
3 this is a case that needs to move forward. There
4 are people out there who deserve to be informed of
5 this litigation and deserve to be given the chance
6 to opt-in or opt-out, and for the case to proceed.
7 That is my primary goal is getting an accurate
8 class list. There were various, you know,
9 allegations that were raised at different times
10 along the way. You know, I tried to keep my main
11 focus on lets get the class list. We can sort all
12 that other stuff out later. It's a really
13 important responsibility. And it took a long time
14 to get it right, and there was a lot of costs that
15 was incurred in getting it right. Who bears that?

16 MR. BAUER: Well, your Honor, you -- I'd
17 again ask plaintiffs' counsel in -- in the -- how
18 do you apportion responsibility --

19 THE COURT: Right.

20 MR. BAUER: -- when the party, the client,
21 who, undisputed in the record, had taken a leading
22 role in this preparation, and it was its books and
23 records and its vendors that were dependent upon is
24 not here. And your Honor had said it at least once
25 and I think a couple other times in the course of

1 this proceeding that in the abundance of caution,
2 you said let's get on with the list. This is a
3 fee-shifting -- this is a fee-shifting case. We
4 can take care of a lot of this at the end if it's
5 incurred more expense.

6 Now, no one wanted Ignite to go belly up. And
7 it resulted in some monetary reward ultimately that
8 could be obtained in the bankruptcy proceeding.
9 But when we talk about fairness and equity, I'm
10 not -- I'm not certain that there's anything that
11 suggests that -- that the plaintiffs' counsel -- or
12 excuse me, defendants' counsel didn't discharge
13 their responsibilities on behalf of their client,
14 and that albeit that it took a longer period of
15 time than anyone wanted, it ran into some real
16 difficulties and some complexities that no one
17 anticipated.

18 But to shift -- to suggest that because the
19 attorneys are now the only ones standing, that they
20 bear the brunt of that, or that they should have to
21 pay fees that were incurred that normally would be
22 argued at the end of the case, and, in fact, were
23 argued in the bankruptcy court as to what would be
24 a justifiable fee for the work that was done and
25 the amount that was recovered, I'm not --

1 THE COURT: Let me ask you that question.
2 How do I address the issue of apportionment, and
3 what factors should be considered, and what's the
4 evidence in the record to help me apply those
5 factors and make that determination?

6 MR. BAUER: Well, I think the -- and I
7 would deal strictly with apportionment, not
8 amounts, your Honor, because I don't have any --

9 THE COURT: I know your answer to
10 apportionment is zero. I get that. But let's, for
11 purposes of this, assume that I'm -- I'm, you know,
12 this side of zero.

13 MR. BAUER: Well, I think the Metzger
14 declaration demonstrates the -- that some of the
15 efforts that counsel was taking, the in-house
16 counsel was taking and the complexity. I think
17 Miss Moore's testimony, the 30(b), put an
18 exclamation point on that because she explained in
19 more detail that there were multiple vendors for
20 multiple entities that were under the Ignite
21 banner. I think that the temporal aspect of the
22 fact that -- that Fisher Phillips was not involved
23 on the outset of this but inherited -- when it came
24 in in April of 2015, inherited this -- this
25 problem, and not only had to rectify it, but also

1 work diligently to try to even understand how this
2 had come to happen. And there was also a period of
3 time when plaintiffs' counsel was themselves going
4 through and trying to sort out and even exploring
5 the prospects of another class. And I can't -- I
6 can't account for how much of this delay and lack
7 of attention on the original list goes to that fact
8 that there was some distractions and motions with
9 respect to efforts to initiate other class actions,
10 and to -- and to communicate. I know that the
11 parties stepped up and paid the costs of the
12 initial mailing and took responsibility for the
13 fact that what went out on that original list was
14 wrong and paid the expense of that.

15 And, in fact, there was a sanction motion
16 pending at that point that was resolved under those
17 circumstances, which leads me to believe the
18 inference was that the client, who paid those
19 expenses, beared the brunt of -- of what had
20 happened and what the delays were.

21 And so I think it's those aspects that the
22 apportionment here is -- I think when attorneys
23 are -- are doing the best they can on behalf of
24 their clients, and to suggest because they're the
25 last ones standing, that they should be apportioned

1 with that responsibility, I don't -- I don't think
2 the -- I don't think the plaintiffs have met their
3 burden on that. And I don't think -- I think on
4 this record it would -- it would suggest that,
5 especially when the Court points to the fact when
6 Miss Osipoff had total control of it, efforts
7 happened, and everything was done with dispatch.

8 THE COURT: Okay. I don't know that I
9 have a basis to find dispatch. There's been no
10 challenge to that. I think from May 18th to the
11 end of August, I don't have any reason in the
12 record to dispute the final product of that. No
13 challenge was brought to the question of dispatch.
14 I'm not suggesting that -- I think that that effort
15 was or wasn't undertaken with dispatch, because
16 that was never an area of inquiry. But I'm not
17 concerned with the third list.

18 MR. BAUER: Okay.

19 THE COURT: What else did you want to tell
20 me?

21 MR. BAUER: Your Honor, I will rest on the
22 papers. I'll answer -- be happy to answer any
23 other questions that you have. I would reiterate
24 the fact that there are some, as the Court went
25 through today and outlined some of the sanctions

1 that remain, gleaning out of the papers, the sale
2 papers, from a year or more ago, there certainly is
3 no reference or anywhere in the record that
4 suggests some type of punitive award or some type
5 of attorney discipline. There's no references to
6 the code of professional responsibility or any --
7 any violations that are alleged on behalf of the
8 defense counsel. And I -- I think those
9 considerations can be dismissed summarily for
10 simply lack of any attention other than perhaps an
11 initial statement in one of the papers.

12 And I do harken back to the circuit's view that
13 any -- any application for sanctions be viewed
14 very -- with restraint and very carefully. It's a
15 very -- and the Seltzer decision talks about the
16 very fine line that the Court has to draw between
17 advocacy and representing a client, and under its
18 circumstances and engaging in some kind of behavior
19 that's intended to delay or obstruct or harass or
20 be in bad faith. And I just think the record is
21 devoid of any -- any evidence that shifts the
22 burden on any of the issues before the Court over
23 to the defendants.

24 THE COURT: Thank you.

25 MR. BAUER: Thank you, Judge.

1 MS. LUKASIEWICZ: Briefly?

2 THE COURT: Yes.

3 MS. LUKASIEWICZ: I just want to very
4 briefly come back to the Metzger declaration. I
5 think it's telling that both in the papers and both
6 counsels today every answer was well, the Metzger
7 declaration says this. This is the first time we
8 have really heard about Metzger. In fact, there
9 was no one with knowledge when we went back in the
10 days when we were trying to figure out what was
11 going on, they said there was no one. We didn't
12 know about Martin. We didn't know about anyone at
13 that time. So this is the exact reasons why we're
14 saying that, you know, the evidentiary hearing
15 makes sense and discovery potentially on that kind
16 of issue. We have not heard these before, and, in
17 fact, every reliance is upon how Metzger knew all
18 this stuff. We don't think it's proper and
19 admissible. But they're raising all these
20 arguments in regard to Metzger and reliance upon
21 obviously that Metzger shows that they're not
22 responsible. So certainly we think that that is
23 telling.

24 I would also say that, you know, the Court has
25 raised the two issues that it was continuing to

1 look into legally about, you know, what is the
2 attorney's duty, you know, to following up with
3 counsel -- I'm sorry, their client. If the Court
4 wants any briefing, again, we are happy to do so on
5 that, as well as privilege. I think the Court, you
6 know, this is the first time we heard about the
7 privilege argument in regards to this, but
8 certainly we don't think that there's privilege,
9 but we'd be happy to brief that as well, should the
10 Court want any further submissions on that.

11 But again, we just think that, you know,
12 highlighted by the Metzger declaration statements
13 today that an evidentiary hearing bringing any of
14 these new discovery, you know, that has been raised
15 may make sense, makes the most sense, and, you
16 know, we can provide a witness list and an exhibit
17 list in advance certainly of that hearing.

18 That's it for me, unless the Court has more
19 questions.

20 THE COURT: What about the argument by
21 Mr. Farella that the agreement in the bankruptcy
22 matter forecloses this claim against Epstein?

23 MS. LUKASIEWICZ: We disagree. It was an
24 agreement with Ignite, and it was -- this is about
25 Epstein Becker's behavior and conduct. And we

1 believe that -- and they were prior counsel. We
2 believe that they are not excluded from here, and
3 it wasn't necessary to exclude them, and we think
4 that they are still fully --

5 THE COURT: Because counsel shouldn't
6 reasonably be read to include prior counsel, only
7 current counsel, is that --

8 MS. LUKASIEWICZ: I think certainly, yes,
9 correct. Prior counsel, and, again, we're going
10 against their specific conduct. We're not going --
11 you know, we are not obviously going against Ignite
12 any longer, and these are about counsel's behavior.

13 THE COURT: But at the time the claims
14 that were --

15 MS. LUKASIEWICZ: They were representing
16 Ignite, I don't disagree with that.

17 THE COURT: You were seeking that relief
18 from Ignite as well as their counsel?

19 MS. LUKASIEWICZ: When we initially filed
20 it, yes, we were seeking against. But I think also
21 to make clear that it's not, as to just suggested
22 today, well, this is all maybe by counsel that this
23 is just what's left, and we're just -- they're
24 stuck with getting the consequences of their
25 behavior. Well, no, it's their behavior that

1 they're stuck with getting the consequences of.
2 It's not because Ignite is gone. It's because we
3 had these repeated failure to comply with the
4 Court's order that took 18 months to get a list,
5 that -- during that time maybe the case could have
6 been, you know, resolved, maybe there could have
7 been judgments. But instead, 18 months later or
8 so, you know, bankruptcy was filed. So I think it
9 has a significant impact on the case. And we're
10 not saying well, you're just the last man standing,
11 you're responsible for it. It's because their
12 behavior made them responsible.

13 I will just also clarify when we spoke earlier
14 and you inquired about what sanctions we were
15 specifically seeking, it's just on page 17 -- I
16 don't think you had pointed to this, so I just
17 wanted to direct. Page 17 of our initial brief it
18 refers to striking the affirmative defense, which I
19 think we discussed, but about the recovery that was
20 precluded by applicable statutes of limitations.
21 It is still our position that, you know,
22 plaintiffs -- opt-in plaintiffs' claims were
23 destroyed or damaged by the delay. And we would
24 continue to say that that is an appropriate
25 sanction.

1 THE COURT: But what is the sanction that
2 you're looking for?

3 MS. LUKASIEWICZ: Any recovery that was
4 precluded because the statute of limitations
5 because they weren't getting notice and during this
6 time the case has since been in bankruptcy.

7 THE COURT: What does that mean? What
8 does that mean?

9 MS. LUKASIEWICZ: Meaning that the case --
10 their recovery could have been resolved at that
11 time if there was not notice issues. So any
12 recovery that they are -- they were seeking
13 could -- we're saying that essentially that they
14 could have gotten a recovery on their claims if it
15 wasn't for the significant delay that was caused by
16 counsel.

17 THE COURT: So, you're seeking the Court
18 to -- I mean, you haven't said here are 3,568
19 plaintiffs who have a claim during this period of
20 time, and this person is seeking \$87 and this
21 person is seeking \$253. Is that what you're
22 talking about?

23 MS. LUKASIEWICZ: We have not specified,
24 correct, as to the specific individuals named or
25 the damages amounts. It's just one of our requests

1 that we are asking, and obviously we could do
2 damage calculations or submit anything, you know,
3 specifically on that. But we think that we're
4 first at the point of what sanctions are
5 appropriate.

6 And again, you know, we think that really this
7 is an evidentiary hearing issue more dealing with
8 the new issues and claims, reliance as defenses
9 raised by defense counsel and should be at the
10 evidentiary hearing. But I just wanted to point
11 out that we see that as different than the
12 affirmative defenses just being barred.

13 If the Court has no further questions --

14 THE COURT: Hold on.

15 MS. LUKASIEWICZ: Oh, okay.

16 THE COURT: I may have further questions.

17 All right. Thank you.

18 MS. LUKASIEWICZ: Thank you, your Honor.

19 MR. BAUER: Your Honor, may I just
20 briefly?

21 THE COURT: Okay.

22 MR. BAUER: On that last point, it talks
23 about the striking of affirmative defenses, tolling
24 of statute of limitations, and any -- and how that
25 may apply. I think the Court addressed that in the

1 beginning. With the litigation with Ignite being
2 over, any question regarding the merits of a claim,
3 would be -- would have been resolved in the
4 bankruptcy proceeding. And there's nothing in any
5 of the briefing or submissions that addresses this
6 issue of somehow the class members having a
7 class --

8 THE COURT: I agree that I don't see that
9 as an argument that's fully presented.

10 MR. BAUER: And two things. One, the
11 Metzger declaration was provided in -- with our
12 first submission and it's been there. There was
13 certainly nothing addressing that -- it was
14 provided once, and then the motion was withdrawn.
15 It was provided again, and no attack in any of the
16 reply papers on the validity or the admissibility
17 or for the Court to consider --

18 THE COURT: I think the admissibility is
19 challenged. I thought I recalled seeing that, that
20 the evidence was not admissible.

21 MR. BAUER: I don't know. In the three or
22 four pages that I saw, I don't think that that was
23 addressed, your Honor.

24 MS. LUKASIEWICZ: Your Honor, I think it
25 is in the first paragraph as well.

1 THE COURT: Do you want to say anything in
2 particular to the -- Mr. Bauer, to the issue of
3 whether the Court has the discretion to order an
4 evidentiary hearing limited to Mr. Metzger's
5 testimony?

6 MR. BAUER: Do I -- do I have --

7 THE COURT: Anything you want to say to
8 that? I think it's a fair point that at oral
9 argument there has been considerable reliance
10 placed by defendants on assertions made in his
11 affidavit, typically, and you reference, as I did,
12 the fact that initially plaintiffs' counsel said
13 we're not asking for live testimony to support our
14 motion, and in the colloquy that I had with --
15 let's see, on September 13th, 2016, I said if you
16 want to offer your case for a written submission,
17 your direct case, you're welcome to do that. You
18 can't make a direct case in writing and then say
19 well, on second thought, we'd like to call a bunch
20 of witnesses. I mean, at that point the burden
21 would then shift to the defendants and any argument
22 you'd make down the road for live testimony would
23 be as a matter of rebuttal. And I think that's, in
24 essence, what Miss Lukasiewicz is saying with
25 respect to Mr. Metzger. That argument, at least

1 right now after two hours of argument, seems to be,
2 you know, a more forceful argument for the Court's
3 exercise of its discretion to say all right, we're
4 not going to have a free-ranging hearing, but
5 you've relied -- you put in an affidavit of
6 Metzger. You know, produce him. You can examine
7 him or not, as you wish, but he should be made
8 available for cross-examination.

9 MR. BAUER: Well, your Honor, I guess my
10 reaction to that is I go back to the Court's
11 initial -- the way this hearing was put in -- or
12 the way that this procedure was put in place back
13 in September, and I see the address in the argument
14 saying our response consists largely of hearsay and
15 perhaps inadmissible evidence. I may have missed
16 it, but I don't see anything specific that relates
17 to Mr. Metzger.

18 THE COURT: But their response is we
19 should have a hearing. You put in opposition
20 papers that relied significantly on this affidavit
21 as has been -- as you continue to do at oral
22 argument. They have asked for a broad hearing.
23 I'm not so sure I'm inclined to a free-ranging
24 hearing that is preceded by a status conference and
25 discovery or anything of that nature. But the

1 simple notion that you're relying on factual
2 assertions, and we should have an evidentiary
3 hearing to at least allow counsel to examine the
4 witness that you're relying is not a --

5 MR. BAUER: Your Honor, from -- from my
6 perspective, it -- it -- the burden was on them
7 initially. We submitted evidentiary -- and we
8 don't think they ever met that burden. And we
9 submitted evidence that -- that supports our
10 position. To now let them go back and say well, we
11 chose this path, but we're -- we're now going to
12 ask for a broad hearing because we didn't -- we
13 didn't -- we didn't decide to do that first to meet
14 our burden, I think is -- it seems to me from the
15 Seltzer decision that the hearing requirements from
16 the Second Circuit are provide due process to those
17 accused of -- of -- involved in sanctionable
18 conduct and have notice and an opportunity to be
19 heard.

20 THE COURT: So you can get to the right
21 and truthful and fair response that will be.

22 MR. BAUER: Correct.

23 THE COURT: That certainly isn't intended
24 to insulate somebody to allow them to put in an
25 affidavit and say we're the accused ones, and

1 therefore you don't get to have any
2 cross-examination on that.

3 MR. BAUER: But there's not a single fact
4 that they put forward that suggested what
5 Mr. Metzger said is not truthful and not accurate.

6 And --

7 THE COURT: Okay. Well, I'll -- I will --
8 I will go back and look at that issue carefully.
9 Again, you know, I'm putting -- I just wanted to
10 put you on notice as I sit here that that argument
11 seems to be an argument that -- that may have some
12 force. It may be I look at Mr. Metzger's affidavit
13 and think that I don't really need to hear from
14 him, not because I reached the conclusion that you
15 do, but because, as I've said, I think there are
16 reasonable inferences that are to be drawn from the
17 record, and Mr. Metzger's affidavit doesn't do
18 anything to rebut those reasonable inferences.

19 MR. BAUER: And, your Honor, I -- if the
20 Court would find it helpful, I would be prepared to
21 submit in camera a -- information that relates to
22 that period of time.

23 THE COURT: Okay. I'm not -- I'm
24 certainly not prepared to take an in camera
25 submission without briefing on the question of an

1 in camera submission. I don't want an in camera
2 submission from counsel that says this is what we
3 did, and therefore I'm left with a decision to
4 write that is not tested by input from the other
5 side, and relies on, you know, in camera
6 submissions. So, I don't -- I'm not inclined to
7 grant the request to take an in camera submission.

8 MR. BAUER: Very well.

9 THE COURT: Okay.

10 MR. BAUER: Thank you.

11 THE COURT: Mr. Farella.

12 MR. FARELLA: If I may --

13 THE COURT: You came for a five-minute
14 argument.

15 MR. FARELLA: I did. I thought I was
16 going to be home by now. Your Honor, just on that
17 issue that you inquired of plaintiffs' counsel
18 about the release, paragraph 8, again, I just want
19 to -- to say that it releases claims that are
20 foreseen or unforeseen in law, equity, or otherwise
21 from the beginning of time to the effective date.
22 When counsel said well, you know, prior counsel
23 wasn't involved, Ogletree was a prior counsel.
24 They were carved out. Epstein Becker was not. So
25 I just want to make that clear. Thank you, your

1 Honor.

2 THE COURT: Thank you.

3 MR. BAUER: Your Honor, if we may, I do
4 want to examine, as the Court has raised this issue
5 of attorney-client privilege, and I may just
6 reserve the right to submit something to the Court
7 if -- if our research on that issue dictates.

8 THE COURT: Okay. I know that there have
9 been a number of requests to take supplemental
10 submissions. And I am -- I'm not granting that
11 relief right now.

12 I think, Mr. Bauer, if you investigate that
13 issue and there is something that you would like to
14 submit on that, if you would, in the first
15 instance, send me a letter and tell me that's what
16 you'd like to do. We can hear from counsel and I
17 can make a decision on that.

18 MR. BAUER: I appreciate that, your Honor.

19 THE COURT: Okay. Anything else?

20 MS. LUKASIEWICZ: I guess would we have
21 the same ability to, if we research it and come
22 across something, at least raise it to the Court
23 and see if at that time we would just want the
24 complimentary --

25 THE COURT: You all are free to write me

1 at any time and say would you like to hear more
2 from me on this, and I will promise you I will make
3 a decision about whether I want to hear more from
4 you on something.

5 Okay. All right. So, nobody commented on the
6 fact that this is the two-year anniversary of the
7 June 6th hearing. I thought, Mr. Bauer, you
8 might -- you might mention that.

9 MR. BAUER: I was mindful of it.

10 THE COURT: Not something that -- that I
11 had in mind when I scheduled it, but it sort of
12 seemed karmic or something. All right. Travel
13 safely. Nice to see you.

14 Oh, I'm sorry. Wait. You can go. We're not
15 going to be to be talking about you in absentia. I
16 want to talk about the individual defendants.

17 Maybe -- maybe I can ask Miss Osipoff,
18 Mr. Gershengorn to come forward. I want to know
19 what progress has been made, if any, in trying to
20 sort out the insurance question.

21 Thank you, Kristen.

22 MS. LUKASIEWICZ: Your Honor, we now have
23 received all of the subpoenaed documents from Star
24 Insurance, and based on the representations that
25 we've received, everything in the individual

1 policies from the individuals, as long as that is
2 accurate, we are prepared to withdraw them as
3 defendants.

4 THE COURT: Okay. And you're prepared --

5 MS. LUKASIEWICZ: And we can prepare a
6 stipulation as to that and circulate it to defense
7 counsel. It's just that it took some time to get
8 all of the stuff, so we can circulate in a week or
9 so.

10 THE COURT: Today's Wednesday. Can I have
11 that by no later from a week from today?

12 MS. LUKASIEWICZ: Absolutely, your Honor.
13 At least I can circulate it. Yes, I will make sure
14 to circulate it to defense counsel, and we can
15 raise it forward.

16 THE COURT: Okay. Very good. Okay.

17 Thank you.

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1 CERTIFICATION
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4 I certify that the foregoing is a
5 correct transcription, to the best of my
6 ability, from the electronic sound recording
7 of the proceedings in this matter.
8
9

10 s/Michelle L. McLaughlin
11 Michelle L. McLaughlin, RPR
12 Court Reporter
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